Supreme Court, U.S.
FILED
APR 25 1996
CLERK

No. 95-1560

In The

Supreme Court of the United States

October Term, 1995

CROW TRIBE OF INDIANS, and
THOMAS L. TEN BEAR,

Petitioners,

v.

CHUCK REPSIS, individually; and
FRANCIS PETERA, individually,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

WILLIAM U. HILL
Wyoming Attorney General

RON ARNOLD*
Senior Assistant Attorney General

KRISTI T. SANSONETTI
Assistant Attorney General
123 Capitol Building
Cheyenne, Wyoming 82002
Telephone: (307) 777-7844

Counsel for Respondents
Chuck Repsis and Francis Petera

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

INTRODUCTION 1

SUMMARY OF *WARD V. RACE HORSE* 1

MISSTATEMENT OF FACT 5

ARGUMENT 6

I. The Tenth Circuit's Decision Is In Accord with the U.S. Supreme Court's Prior Decisions Interpreting Off-Reservation Indian Hunting Rights 6

A. Subsequent U.S. Supreme Court Decisions Have Continued to Follow the Principle in *Ward v. Race Horse* and *Geer v. Connecticut*, 161 U.S. 519 (1896), that the States have Authority to Regulate Game within their Borders 8

B. Subsequent U.S. Supreme Court Decisions Have Not Diminished the Application of the Equal Footing Doctrine in *Ward v. Race Horse* 10

C. The Tenth Circuit Decision Does Not Conflict With This Court's Decisions Regarding Abrogation of Treaty Rights 12

D. The Tenth Circuit's Distinction Between Temporary and Continuing Treaty Rights was Proper 14

E. This Case is One Most Appropriate for the Application of *Stare Decisis* 15

II. The Tenth Circuit's Decision Is In Harmony with Other Federal and State Courts 16

TABLE OF CONTENTS – Continued

Page

III. The Tenth Circuit's Alternate Holding that the Big Horn National Forest Lands Are Occupied Was Proper 22

IV. The Tenth Circuit Properly Determined that the State's Regulations were Reasonable and Necessary for Conservation 24

CONCLUSION 26

TABLE OF AUTHORITIES

Page

CASES

Anderson v. O'Brien, 524 P.2d 390 (Wash. 1974) (dissenting opinion) 18

Antoine v. Washington, 420 U.S. 194 (1975) 11, 12, 14

Board of County Comm'n v. United States, 308 U.S. 343 (1939) (Black concurrence) 6

Bollin v. Nebraska, 176 U.S. 83 (1900) 6, 10

Brewer-Elliot Oil & Gas Co. v. United States, 260 U.S. 77 (1922) 6, 10

British-American Oil Prod. Co. v. Board of Equalization, 54 P.2d 129 (Mont.), *aff'd*, 299 U.S. 159 (1936) 17

Commonwealth of Pennsylvania v. Coxe, 4 U.S. 170 (1880) 15

Confederated Tribes of the Umatilla Indian Reservation, 262 F.Supp. 871 (D.Ore. 1966) 17

Coyle v. Smith, 221 U.S. 559 (1910) 6, 10

Coyle v. Smith, 113 P. 944 (Okl.) (dissent), *aff'd*, 221 U.S. 559 (1911) 17

Crow Tribe v. Repsis, 73 F.3d 982 (10th Cir. 1995) ....*passim*

Crow Tribe v. Repsis, 866 F.Supp. 520 (D.Wyo. 1994), *aff'd*, 73 F.3d 982 (10th Cir. 1995) 1, 6, 16

Department of Game v. Kautz, 422 P.2d 771 (Wash. 1967), *aff'd*, *Payallup I*, 391 U.S. 392 (1968) 18

Dick v. United States, 208 U.S. 340 (1908) 11, 19

Ex Parte Crosby, 149 P. 989 (Nev. 1915) 17

Ex Parte Nowabbi, 61 P.2d 1139 (Okl. 1936) 17

TABLE OF AUTHORITIES – Continued

Page

Ex Parte Webb, 225 U.S. 663 (1911) 6, 10

Frantz v. Autry, 91 P. 193 (Okl. 1907)..... 18

Gearlds v. Johnson, 183 F. 611 (D. Minn. 1911)..... 16

Geer v. Connecticut, 161 U.S. 519 (1896).....8, 9

Godfrey v. Iowa Land & Trust Co., 95 P. 792 (Okl. 1908)..... 17

Higgins v. Brown, 94 P. 703 (Okl. 1908)..... 17

Holcomb v. Confederated Tribes of Umatilla Reservation, 382 F.2d 1013 (9th Cir. 1967)..... 19, 21, 22, 24

Hollow Horn Bear v. Jameson, 95 N.W.2d 181 (S.D. 1959)..... 18

Huff v. State, 133 P. 265 (Okl. 1913) 17

Hughes v. Oklahoma, 441 U.S. 322 (1979) 8, 9

In re the General Adjudication of All Rights to Use Water in the Big Horn River System, 753 P.2d 76 (Wyo. 1988), *cert. denied*, 492 U.S. 926 (1989) 18

Ivanhoe Irrig. Dist. v. McCracken, 357 U.S. 275 (1958)..... 23

John Bund Brewing Co. v. Great N. Ry. Co., 246 U.S. 651 (1917)..... 6

Kennedy v. Becker, 109 N.E. 116 (N.Y. 1915), *aff'd*, 241 U.S. 556 (1916) 17

Kleppe v. New Mexico, 426 U.S. 529, *reh'g denied*, 429 U.S. 873 (1976) 9, 23

TABLE OF AUTHORITIES – Continued

Page

Lac Courte Orelles Band v. Voight, 700 F.2d 341 (7th Cir.), *cert. denied*, 464 U.S. 804 (1983).....14, 21

LaCoste v. Department of Conservation, 263 U.S. 545 (1923) 6

Lone Wolf v. Hitchcock, 187 U.S. 553 (1903)..... 6

MacCormick v. Molinari, 16 P.P.R. 389 (Puerto Rico 1910)..... 18

Makah Indian Tribe v. McCauly, 39 F.Supp. 75 (W.D. Wash. 1941), *rev'd*, 128 F.2d 867 (9th Cir. 1942) 17

McCabe v. Atchison, T.& S.F. Ry. Co., 186 F. 966 (8th Cir. 1911), *aff'd*, 235 U.S. 151 (1914)..... 16

McCabe v. Atchison, T.& S.F. Ry. Co., 235 U.S. 151 (1914) 6, 10

Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968)..... 6

Menominee Tribe of Indians v. United States, 388 F.2d 998 (Ct.Cl. 1967), *aff'd*, 391 U.S. 404 (1968)..... 16

Merrill v. Bishop, 287 P.2d 620 (Wyo. 1955) 18

Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) 6

Metlakatla Indian Community v. Egan, 362 P.2d 901 (Alaska 1961), *rev'd*, 369 U.S. 45, *aff'd*, 369 U.S. 60 (1962). 17

New York ex rel. Bryant v. Zimmerman, 278 U.S. 63 (1928)..... 6

New York ex rel. Kennedy v. Becker, 241 U.S. 556 (1915)..... 6

Northern States Power Co., 50 FPC 753 (1973) 18

TABLE OF AUTHORITIES – Continued

Page

Oregon Wildlife Dept. v. Klamath Tribe, 473 U.S. 753 (1985) 6, 13, 14

Organized Village of Kake v. Egan, 174 F.Supp. 500 (D.Alaska 1959) 17

Organized Village of Kake v. Egan, 369 U.S. 60 (1962) 6

Pablo v. People, 46 P. 636 (Colo. 1896) 17

Patterson v. McLean Credit Union, 491 U.S. 164 (1989) 15, 20

People of South Naknek v. Bristol Bay Borough, 466 F.Supp. 870 (D.Alaska 1979) 17

People v. Chosa, 233 N.W. 205 (Mich. 1930) 17

People v. LeBlanc, 248 N.W.2d 199 (Mich. 1976) 21

People v. McCovey, 685 P.2d 687 (Cal.), *cert. denied*, 469 U.S. 1062 (1984) 17

Puyallup Tribe v. Department of Game (Puyallup I), 391 U.S. 392 (1968) 9, 18

Quill Corp. v. North Dakota, 504 U.S. 298, 119 L.Ed.2d 91, 112 S.Ct. 1904 (1992) 15

Ruddy v. Rossi, 248 U.S. 104 (1918) (Holmes dissent) 6, 10

Seminole Tribe of Florida v. Florida, et al., Civ. No. 94-12, slip op. (U.S. Mar. 27, 1996) 15

Settler v. Lameer, 507 F.2d 231 (9th Cir. 1974) ... 19, 21, 22

Smith v. Hepburn, 113 P. 932 (Okl. 1911) 17

Starks v. Joines, 223 P. 882 (Okl. 1924) 17

State of Arizona v. Hobby, 221 F.2d 498 (D.C. Cir. 1954) 16

TABLE OF AUTHORITIES – Continued

Page

State of Washington v. Confederated Tribes of the Colville Indian Reservation., 447 U.S. 134 (Rehnquist concurrence and dissent), *reh'g denied*, 448 U.S. 911 (1980) 6

State v. Arthur, 261 P.2d 135 (Idaho 1953), *cert. denied*, 347 U.S. 937 (1954) 19, 20, 24

State v. Cutler, 708 P.2d 853 (Idaho 1985) 21

State v. Gurnoe, 192 N.W.2d 892 (Wis. 1972) 18

State v. Jondreau, 185 N.W.2d 375 (Mich. 1971) 19

State v. LaBarge, 291 N.W. 299 (Wis. 1940) 18

State v. McConville, 139 P.2d 485 (Idaho 1943) 17

State v. McCoy, 387 P.2d 942 (Wash. 1963) 18

State v. Meninock, 197 P. 641 (Wash. 1921) 18

State v. Miller, 689 P.2d 81 (Wash. 1984) 21, 24

State v. Morrin, 117 N.W. 1006 (Wis. 1908) 18

State v. Sanapaw, 124 N.W.2d 41 (Wis. 1963), *cert. denied*, 377 U.S. 991, *reh'g denied*, 379 U.S. 871 (1964) 18

State v. Satiacum, 314 P.2d 400 (Wash. 1957) 18

State v. Starkweather, 7 N.W.2d 747 (Minn. 1943) 17

State v. Stasso, 563 P.2d 562 (Mont. 1977) 21, 24

State v. Superior Court, 181 P. 688 (Wash. 1919) 18

State v. Tinno, 497 P.2d 1386 (Idaho 1972) ... 19, 20, 21, 24

State v. Towessnute, 154 P. 805 (Wash. 1916) 18

State v. Truax, 157 N.E. 792 (Ohio 1927) 17

TABLE OF AUTHORITIES – Continued

Page

State v. Tulee, 109 P.2d 280 (Wash. 1941), *rev'd*, 315 U.S. 681 (1942) 18

State v. Wallahee, 255 P. 94 (Wash. 1927) 18

Sturdevant v. State, 251 N.W.2d 50 (Wis.), *cert. denied*, 431 U.S 970 (1977) 18

Swim v. Bergland, 696 F.2d 712 (9th Cir. 1983) 24

Toomer v. Witzell, 73 F.Supp. 371 (E.D.S.C. 1947), *aff'd in part*, 334 U.S. 385 (1948) 17

Tsosie v. United States, 11 Cl. Ct. 62 (1986), *aff'd*, 825 F.2d 393 (Fed. Cir. 1987) 16

Tulee v. Washington, 315 U.S. 681 (1942) 6, 7, 8, 12, 14

Underhill v. State, 237 P. 628 (Okl. 1925) 17

United States v. 2,271.29 Acres, 31 F.2d 617 (D.Wis. 1928) 16

United States v. Brooks, 32 F.Supp. 422 (N.D.Ind. 1940) 17

United States v. Cardish, 145 F. 242 (E.D.Wis. 1906) 16

United States v. Hicks, 587 F.Supp. 1162 (W.D.Wash. 1984) 24

United States v. Karnuth, 24 F.2d 649 (2d Cir. 1928), *rev'd*, 279 U.S. 231 (1929) 16

United States v. McCullaugh, 221 F. 288 (D.Kan. 1915) 16

United States v. Michigan, 471 F.Supp. 192 (W.D.Mich 1979), *aff'd in part*, 653 F.2d 277 (6th Cir.), *cert. denied*, 454 U.S. 1124 (1981) 19, 21

TABLE OF AUTHORITIES – Continued

Page

United States v. Samples, 258 F. 479 (W.D.Mo. 1919), *aff'd*, *Missouri v. Holland*, 252 U.S. 416 (1920) 16

United States v. Sandoval, 198 F. 539 (D.N.M. 1912), *rev'd*, 231 U.S. 28 (1913) 16

United States v. State Tax Comm'n of Mississippi, 541 F.2d 469 (5th Cir. 1976) 16

United States v. Thompson, 258 F. 257 (E.D.Ark. 1919) 16

United States v. Three Winchester 30-30 Caliber, 504 F.2d 1288 (7th Cir. 1974) 16

United States v. Tulee, 110 F.2d 797 (9th Cir. 1940) 16

United States v. United States Express Co., 180 F. 1006 (W.D.Ark. 1910), *rev'd*, 191 F. 673 (8th Cir. 1911) 16

United States v. Washington, 384 F.Supp. 312 (W.D.Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086, *reh'g denied*, 424 U.S. 978 (1976), *vacated*, 443 U.S. 658 (1979) 17

United States v. Winans, 198 U.S. 371 (1905) 6, 7, 10, 11, 12, 14

Van Camp Sea Food Co. v. Department of Nat'l Resources, 30 F.2d 111 (S.D.Cal. 1929) 16

Vasquez v. Hillery, 474 U.S. 254 (1986) 15

Virginia v. West Virginia, 246 U.S. 565 (1917) 6, 10

Wadsworth v. Boysen, 148 F. 771 (8th Cir. 1906) 17

Ward v. Race Horse, 163 U.S. 504 (1896) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Washington State Commercial Passenger Fishing Vessel Ass'n v. Tollefson, 571 P.2d 1373 (Wash. 1977), *vacated*, 443 U.S. 658 (1979) 18

Washington v. Fishing Vessel Ass'n, 443 U.S. 658 (1979) 6

Weeks v. United States, 406 F.Supp. 1309 (W.D.Okl. 1975), *rev'd*, *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, *reh'g denied*, 431 U.S. 960 (1977) 17

Williams v. Johnson, 122 P. 485 (Okl. 1912), *aff'd*, 239 U.S. 414 (1915) 17

Winters v. United States, 207 U.S. 564 (1908) 6

Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) 13

U.S. Statutes & Regulations

Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §§ 1701-84 23

Multiple-Use, Sustained-Yield Act of 1960 (MUSY), 16 U.S.C. §§ 425, 528-31 ..... 22, 23

National Forest Management Act of 1976 (NFMA), 16 U.S.C. §§ 1600-14 23

36 C.F.R. § 241.2 23

Other Authorities

15 Stat. 649 (Crow Treaty of 1868, Article 4) 2

15 Stat. 673 (Bannock Treaty of 1868, Article 4) 2

Wyoming's Act of Admission, 26 Stat. 222, ch. 664, § 1 (July 10, 1890) 3

TABLE OF AUTHORITIES – Continued

Page

Wyoming's Territorial Act, 15 Stat. 178, ch. 235 (July 1968) 3

Big Horn National Forest Act of June 4, 1897, ch. 2, 30 Stat. 34 22

Big Horn National Forest Presidential Proclamation, No. 30, 29 Stat. 909 (1897) 22

29 U.S. Op. Att'y Gen. 455 (June 19, 1912) 18

71 Sol. Op. 469 (I.D. No. 12, Dec. 1, 1964) 18

54 Sol. Op. 418 (I.D. April 5, 1934) 18

53 Sol. Op. 349 (I.D. April 15, 1931) 18

3 Wyo. Att'y Gen. Op. 11 (Feb. 26, 1973) 18

Wyo. Att'y Gen. Op. 27 (July 25, 1901) 18

Wyo. Att'y Gen. Op. 51 (Nov. 30, 1901) 18

Wyo. Att'y Gen. Op. 97 (July 29, 1899) 18

1977 Memorandum of Understanding 23

INTRODUCTION

Respondents, Chuck Repsis and Francis Petera (Repsis), submit this brief in opposition to the brief on petition for writ of certiorari filed by Petitioners, the Crow Tribe and Thomas L. Ten Bear (Crow Tribe). The United States Court of Appeals for the Tenth Circuit properly affirmed the Wyoming Federal District Court's decision. The Tenth Circuit determined that the case of *Ward v. Race Horse*, 163 U.S. 504 (1896), is controlling and that "there is nothing to indicate that it has been 'overruled, repudiated or disclaimed.' " The Tenth Circuit also properly concluded that the Big Horn National Forest has been "occupied" since the creation of the national forest in 1887, and that the Crow Tribe and its members are subject to the game laws of the State of Wyoming. No special or important reasons exist which should compel this Court to grant review on writ of certiorari.

SUMMARY OF *WARD V. RACE HORSE*

Both the Wyoming District Court and the Tenth Circuit held that the facts presented in *Ward v. Race Horse*, 163 U.S. 504 (1896), are indistinguishable from the facts presented in this case. *Crow Tribe v. Repsis*, 73 F.3d 982, 985-86, 987-88 (10th Cir. 1995); *Crow Tribe v. Repsis*, 866 F.Supp. 520, 524 (D.Wyo. 1994). Except for a 100-year time span, this case is simply "*deja vu* all over again."[1]

---

[1] Yogie Berra.

Specifically, neither Mr. Race Horse, a Bannock Indian, nor Mr. Ten Bear, a Crow Indian and Petitioner in this case, were residents of the State of Wyoming. Both were arrested for illegally killing elk on federal lands located in the State in violation of state law. *See* 163 U.S. 504; 73 F.3d at 985. In their defense, both Mr. Race Horse and Mr. Ten Bear claimed identical treaty language gave them and all members of their tribes unrestricted, off-reservation hunting rights:

> The Indians herein named agree . . . they will make said reservation[s] their permanent home . . . but they shall have the *right to hunt on unoccupied lands* of the United States as long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the *hunting districts*.

163 U.S. at 505, *quoting*, 15 Stat. 673 (Bannock Treaty of 1868, Article 4); 73 F.3d at 985-86, *quoting*, 15 Stat. 649, 650 (Crow Treaty of 1868, Article 4) (emphasis added).

In construing the treaty hunting provision in its entirety, the *Race Horse* Court held that the words "unoccupied lands" must be read together with the words "hunting districts." 163 U.S. at 508. Thus, the words *"unoccupied lands"* were interpreted as being "only lands of that character embraced within what the treaty denominates as hunting districts," and not all the lands ceded by the Indians which were owned by the United States and not yet settled. 163 U.S. at 508; 73 F.3d at 988 (emphasis added). Hence, this Court determined that the right to hunt provided in the treaty was not a perpetual right, but a temporary and precarious privilege, expressly

limited to the continuing existence of the hunting districts referred to in the treaty. 163 U.S. at 508-509, 510 & 515; 73 F.3d at 988.

In July 1868, the same year the Bannock and Crow treaties were ratified, the Act providing for a temporary government for the Territory of Wyoming was enacted and provided:

> That nothing in this act shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians.

15 Stat. 178, ch. 235 (July 1868); *Race Horse*, 163 U.S. at 506; *Crow Tribe*, 73 F.3d at 988-89 n.3.

However, as this Court points out in *Race Horse*, Wyoming's later 1890 Act of Admission does not include this provision and instead "contains no exception or reservation in favor of or benefit of Indians." 163 U.S. at 506 & 511; 73 F.3d at 989. The Act, however, provides:

> That the State of Wyoming is hereby declared to be a State of the United States of America, and is hereby declared *admitted into the Union on an equal footing with the original States in all respects whatever*. . . .

26 Stat. 222, ch. 664, § 1 (July 10, 1890) (emphasis added); 73 F.3d at 989 n.3.

A. Extinguishment of Hunting Districts

In reconciling the hunting provision of the treaty with Wyoming's Act of Admission, this Court determined

that the treaty right to hunt within the "hunting districts" ended "when the territory ceased to be a part of the hunting districts and came within the authority and jurisdiction of [the] state." 163 U.S. at 509-510. In other words, the "hunting districts" referenced in the treaty no longer existed once they were subsequently included within the borders of the State of Wyoming.

The Court based its determination that this was a temporary and precarious privilege, in part, on the fact that Indian "hunting districts" referred to in the treaty could be sold or carved out as a federal reservation, as had been done with Yellowstone National Park, without violating any treaty right to hunt. *Id.*, at 510. *See also* 73 F.3d at 988.

B. Application of the Equal Footing Doctrine

In addition, this Court determined that the right to hunt within these "hunting districts" conflicted with the State of Wyoming's right to regulate and control the taking of game within its borders. 163 U.S. at 509. Specifically, the treaty gave the Bannock Indians a right to hunt which was in conflict with the State's regulation of game. This Court reasoned that the State must be allowed to regulate the game within its jurisdiction, in order to place it on equal footing with all other states which regulate the game found within their jurisdictions. *Id.* at 510. Thus, this Court determined that because the treaty gave the Bannock Indians only a temporary and precarious privilege to hunt, and the Act of Admission was otherwise silent, this Act superseded the Act ratifying the 1868 Bannock treaty. 163 U.S. at 511 & 515.

In making this determination, the *Race Horse* Court noted that where Congress created rights during the existence of a Territory, which by their nature imply perpetuity and Congress' consequent purpose for them to continue after the State's admission, such continuation will be upheld, although the enabling act is silent. *See id.* at 515; 73 F.3d at 989. Nevertheless, in this case, where the nature of the right created gives no implication of continuance, and is essentially perishable and intended to be of limited duration, the treaty "does not give [the Tribe] the right to exercise this privilege within the limits of [Wyoming] in violation of its laws." 73 F.3d at 989, *quoting*, 163 U.S. at 504.

MISSTATEMENT OF FACT

Contrary to its statement to this Court, the Crow Tribe in its original Complaint and Amended Complaint, alleged an "unrestricted" right to hunt in Wyoming pursuant to Article 4 of the 1868 Treaty between the Crow Tribe and the United States. (*Compare* Petitioners' S.Ct. brief, at 3, n.1 *with Crow Tribe*, 73 F.3d at 988. Thus, the Tenth Circuit precisely and succinctly represented the allegations presented by the Crow Tribe in both of its Complaints. *Id.*

ARGUMENT

I. The Tenth Circuit's Decision Is In Accord with the U.S. Supreme Court's Prior Decisions Interpreting Off-Reservation Indian Hunting Rights.

As the Tenth Circuit so succinctly states, "*Ward v. Race Horse* is alive and well." 73 F.3d at 994. As the Wyoming District Court observed, this Court has continued to cite to *Race Horse* in support of various propositions of law. 866 F.Supp. at 524. Specifically, this Court has cited to or relied on the *Race Horse* case over twenty times during the last hundred years, and as recently as 1985.[2]

---

[2] *Oregon Wildlife Dept. v. Klamath Tribe*, 473 U.S. 753, 773 n.23 (1985); *State of Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 179 (1980) (Rehnquist concurrence and dissent), *reh'g denied*, 448 U.S. 911 (1980); *Washington v. Fishing Vessel Ass'n*, 443 U.S. 658, 682 n.25 (1979); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 149 (1973); *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412 n.12 (1968); *Organized Village of Kake v. Egan*, 369 U.S. 60, 75 (1962); *Tulee v. Washington*, 315 U.S. 681, 683 n.2 (1942); *Board of County Comm'n v. United States*, 308 U.S. 343, 354 n.5 (1939) (Black concurrence); *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 70 n.6 (1928); *LaCoste v. Department of Conservation*, 263 U.S. 545, 549 (1923); *Brewer-Elliot Oil & Gas Co. v. United States*, 260 U.S. 77, 83 (1922); *Ruddy v. Rossi*, 248 U.S. 104, 109 (1918) (Holmes dissent); *John Bund Brewing Co. v. Great N. Ry. Co.*, 246 U.S. 651, at 651 (1917); *Virginia v. West Virginia*, 246 U.S. 565, 593 (1917); *New York ex rel. Kennedy v. Becker*, 241 U.S. 556, 562 (1915); *McCabe v. Atchison, T.& S.F. Ry. Co.*, 235 U.S. 151, 159-60 (1914); *Ex Parte Webb*, 225 U.S. 663, 683, 690 (1911); *Coyle v. Smith*, 221 U.S. 559, 573 & 576 (1910); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903); *Bollin v. Nebraska*, 176 U.S. 83, 88 (1900). *See also Winters v. United States*, 207 U.S. 564 (1908) (argued in counsel's brief, but not cited in opinion); *United States v. Winans*, 198 U.S. 371, 374-75 (1905) (argued in counsel's brief for appellees, but not cited in opinion).

The U.S. Supreme Court has had numerous opportunities over the past hundred years to overrule *Race Horse*, either expressly or implicitly. It has not.

In 1905, only nine years after issuing the *Race Horse* decision, this Court had an opportunity to overrule *Race Horse*, on grounds similar to those cited by Petitioners. In *United States v. Winans*, 198 U.S. 371 (1905),[3] this Court upheld an Indian treaty right to take "fish at all usual and accustomed places in common with the citizens of the Territory of Washington." Unlike *Race Horse* where the treaty language conveyed only a temporary privilege to hunt, this Court concluded that the treaty language in *Winans* imposed a servitude on the lands bordering the Columbia River that was intended to be continuing against the United States and its grantees, including the State. 198 U.S. at 379; 73 F.3d at 991.

Almost forty years later, in *Tulee v. Washington*, this Court again recognized that a treaty right could be a continuing right to hunt. 315 U.S. 681 (1942). In that case, the treaty language on off-reservation hunting rights was identical to the treaty language in *Winans*, and dissimilar to the treaty language in issue in this case. *See* 315 U.S. at 683.

As the Tenth Circuit notes in its decision, the *Race Horse* Court was fully aware of Congress' power to create continuing rights which would be binding on the states. 73 F.3d at 991, *citing*, 163 U.S. at 515. Nevertheless, in

---

[3] While the *Race Horse* case was briefed in *Winans*, this Court did not cite to nor, as Petitioners contend, in any way overrule *Race Horse*. *Id.* at 374-75.

order to be binding on a state, the right must be continuing or perpetual, and intended at its formation to be continuing against the United States and its grantees. 73 F.3d at 991, *citing, Winans,* 198 U.S. at 381-82. While the treaties in *Winans* and *Tulee* provide a continuing hunting right or servitude on the land, the treaty at issue in this case, like the treaty in *Race Horse,* imposes a temporary hunting right which only continued with the existence of "hunting districts." Those districts no longer existed once they were subsequently included within the borders of the State of Wyoming.

A. Subsequent U.S. Supreme Court Decisions Have Continued to Follow the Principle in *Ward v. Race Horse* and *Geer v. Connecticut,* 161 U.S. 519 (1896), that the States have Authority to Regulate Game within their Borders.

In *Race Horse,* this Court stated that "[t]he power of a state to control and regulate the taking of game cannot be questioned." 163 U.S. at 507, *citing, Geer v. Connecticut,* 161 U.S. 519 (1896). The *Race Horse* Court went on to explain that it is a necessary incident of a sovereign state to have authority to regulate the killing of game within its borders. 163 U.S. at 510.

This principle has not changed. While this Court in *Hughes v. Oklahoma,* 441 U.S. 322, 335 (1979), overruled state ownership of wildlife, as articulated in *Geer,* it did not overrule or in any way reject the principle that the

States nevertheless have authority to regulate wildlife within their borders. *Id.* at 338-39. It stated:

> The overruling of *Geer* does not leave the States powerless to protect and conserve wild animal life within their borders. Today's decision makes clear, however, that States may promote this legitimate purpose only in ways consistent with the basic principle that 'our economic unit is the Nation,' and that when a wild animal becomes an article of commerce its use cannot be limited to the citizens of one State to the exclusion of citizens of another State.

Id. See also 73 F.3d at 990. Thus, as the Tenth Circuit stated in its opinion, "[t]he Court in *Hughes* has not stripped the states of their authority to regulate and control game; it has merely removed the 19th century legal fiction of state ownership of game." 73 F.3d at 990, *citing, Hughes,* 441 U.S. at 336. "Unquestionably, the States have broad trustee and police powers over wild animals within their jurisdictions." *Id., quoting, Kleppe v. New Mexico,* 426 U.S. 529, 545, *reh'g denied,* 429 U.S. 873 (1976).

The Tenth Circuit noted that this Court has recognized that states may regulate *off-reservation treaty rights* "in the interest of conservation, provided the regulations meet appropriate standards and do not discriminate against the Indians." *Crow Tribe,* 73 F.3d at 992, *quoting, Puyallup Tribe v. Department of Game, (Puyallup I),* 391 U.S. 392, 398 (1968) (emphasis added). However, it properly concluded that this is not the case here where the Crow Tribe's right to hunt in hunting districts was repealed by the Act admitting Wyoming into the Union. *Id.* "Therefore, the Tribe and its members are subject to Wyoming's

game laws and regulations regardless of whether the regulations are reasonable and necessary for conservation." *Id.* at 992-93. The Tenth Circuit further concluded that even if the Crow Tribe had a continuing right surviving Wyoming's admission, the record has ample evidence to support the State's contention that its regulations are reasonable and necessary for conservation. *Id.* at 993.

B. Subsequent U.S. Supreme Court Decisions Have Not Diminished the Application of the Equal Footing Doctrine in *Ward v. Race Horse.*

Subsequent United States Supreme Court decisions have not diminished the application of the equal footing doctrine as applied in *Race Horse* or with respect to off-reservation hunting. To the contrary, *Race Horse* has been relied on by this Court in over seven cases when discussing the principles of the equal footing doctrine.[4] Moreover, the equal footing doctrine has not been applied in other off-reservation hunting cases, not because it is no longer favored, but because it did not apply where the hunting right in question was perpetual and continuing.

For example, in *Winans,* this Court addressed the issue of the equal footings doctrine, but only after it determined that the treaty language in issue imposed a

---

[4] *Brewer-Elliot Oil & Gas Co. v. United States,* 260 U.S. 77, 83 (1922); *Ruddy v. Rossi,* 248 U.S. 104, 109 (1918) (Holmes dissent); *Virginia v. West Virginia,* 246 U.S. 565, 593 (1917); *McCabe v. Atchison, T.& S.F. Ry. Co.,* 235 U.S. 151, 159-60 (1914); *Ex Parte Webb,* 225 U.S. 663, 683, 690 (1911); *Coyle v. Smith,* 221 U.S. 559, 573 & 576 (1910); *Bollin v. Nebraska,* 176 U.S. 83, 88 (1900).

servitude on the lands bordering the Columbia River, which continued against the United States and the State. 198 U.S. at 381-82. It concluded that the equal footing doctrine would not apply where the United States, while holding the country as a territory, created rights which would be binding on the states. *Id.* Thus, the Court did not reject the equal footings doctrine as inapplicable to any off-reservation hunting right, but determined that it was not applicable where the right extended was perpetual.

Similarly, the Tenth Circuit in discussing *Winans*, recognized that the equal footing doctrine does not prevent the United States from creating a right in a territory which would be binding on the state on its admission into the Union. However, it noted that, like the treaty in *Race Horse*, the treaty language involved here does not provide a continuing or perpetual right which is binding on the State of Wyoming. 73 F.3d at 991.

Petitioners rely extensively on another decision, *Antoine v. Washington*, 420 U.S. 194 (1975), in support of their contention that the equal footing doctrine no longer has favor in this Court with respect to off-reservation hunting. In *Antoine*, this Court interpreted an agreement, ratified by Congress, for the benefit of the Indians which provides that "the right to hunt and fish in common with all other persons on lands not allotted to said Indians *shall not be taken away or in anyway abridged.*" *Id.* at 196 (emphasis added). This Court held that the State's consent to the Agreement was not required and that because it was ratified by Congress, it was superior and paramount to the authority of any affected state. *Id.* at 204, *citing, Dick v. United States*, 208 U.S. 340 (1908).

This case is distinguishable from *Race Horse* and the current case for the very same reasons articulated in *Winans* and *Tulee*. The agreement in *Antoine* and the treaties in *Winans* and *Tulee* confer a continuing right to hunt which runs with the land and is not a temporary and precarious right, as it is in the Bannock and Crow treaties. Thus, neither the admission of a state into the Union nor the equal footing doctrine would be sufficient to abrogate the type of continuing right conveyed in those cases.

Consequently, broad and sweeping generalizations, made by the Crow Tribe and others, that the equal footing doctrine no longer applies to off-reservation hunting, should be disregarded. (*See* Petitioners' S.Ct. Brief at 12 & 13). Generalizations, which are not based on the facts of each case, are not sufficient grounds for this Court to reject the 100-year old application of the equal footings doctrine in a case as fact specific as *Race Horse*.

C. The Tenth Circuit Decision Does Not Conflict With This Court's Decisions Regarding Abrogation of Treaty Rights.

As the Tenth Circuit Court noted, the canon of treaty construction favoring the Indian interpretation and resolving ambiguities in favor of the Indians was well established at the time the Court decided *Race Horse*. 73 F.3d at 992. In fact, as the Tenth Circuit notes, in 1832, sixty-four years prior to the *Race Horse* decision, this Court held:

> The language used in treaties with the Indians should never be construed to their prejudice. If

> words be made use of, which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense. . . . How the words of the treaty were understood by this unlettered people, rather than their critical meaning should form the rule of construction.

Id. at 992, *quoting, Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 582 (1832).

The Tenth Circuit properly noted that the Court in *Race Horse* recognized this canon of construction, but declined to follow it, stating:

> Doubtless the rule that treaties should be so construed as to uphold the sanctity of the public faith ought not to be departed from. But that salutary rule should not be made an instrument for violating the public faith by distorting the words of a treaty, in order to imply that it conveys rights wholly inconsistent with its language and in conflict with an act of Congress, and also destructive of the rights of one of the States.

73 F.3d at 992, *quoting, Race Horse*, 163 U.S. at 516.

Nevertheless, the Crow Tribe complains that under more recent rules of construction, silence in Wyoming's Act of Admission, as to any exemption or reservation in favor of Indians, is not enough to abrogate a treaty right. However, as recently as 1985, in interpreting an agreement with an Indian tribe, this Court determined that silence in an agreement concerning hunting rights is consistent with an intent to end those rights outside the reservation. *See Oregon Wildlife Dept. v. Klamath Tribe*, 473

U.S. 753, 773 n.23 (1985). Specifically, this Court stated that "viewed in the entirety of its particular historical context, *silence* concerning specific rights in the 1901 Agreement *is consistent with an intent to end any special right of the Tribe outside the reservation.*" *Id., citing, Race Horse,* 163 U.S. 504 (1896) (emphasis added).

D. The Tenth Circuit's Distinction Between Temporary and Continuing Treaty Rights was Proper.

The Tenth Circuit properly distinguished this case and the *Race Horse* case from this Court's other cases which interpret treaty language giving a permanent and continuing right to hunt. 73 F.3d at 990-993, 994 n.6. While the treaties in *Winans* and *Tulee,* and the Agreement in *Antoine,* provide a continuing hunting right, the treaty at issue in this case, like the treaty in *Race Horse,* imposes a hunting right which only continued with the existence of "hunting districts." Those districts no longer existed once they were subsequently included within the borders of the State of Wyoming.

In the case now relied on by the Crow Tribe, *Lac Courte Orelles Band v. Voight,* 700 F.2d 341 (7th Cir.), *cert. denied,* 464 U.S. 804 (1983), the treaty language in issue recognized the right to hunt "until required to be removed by the President of the United States." The Court determined that the treaty therefore granted only a temporary hunting right, which could not be extinguished by implication but only by removal by the President. However, in the case at hand, the treaty gives a temporary hunting right which may be extinguished

when the hunting districts no longer exist. On the admission of the State of Wyoming to the Union, the contingency on which the treaty right could be extinguished – *the demise of hunting districts* – was met.

E. This Case is One Most Appropriate for the Application of *Stare Decisis*.

The Tenth Circuit properly applied *stare decisis* in concluding that *Race Horse* must be followed. 73 F.3d at 994. Not only does this case involve material facts which are indistinguishable from *Race Horse*, but the Tenth Circuit also properly concluded that "there is nothing to indicate that *Race Horse* has been 'overruled, repudiated or disclaimed.' " *Id.*

The idea that courts are bound by precedent embodies one of the basic principles of American jurisprudence; it ensures that "the law will not merely change erratically" and "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals." *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989), *quoting, Vasquez v. Hillery*, 474 U.S. 254, 265 (1986). From the 1800's to the present, this Court has recognized that courts must follow long-established precedents. *See, e.g., Commonwealth of Pennsylvania v. Coxe*, 4 U.S. 170, 191-192 (1880), to *Quill Corp. v. North Dakota*, 504 U.S. 298, ___, 119 L.Ed.2d 91, 106-108, 112 S.Ct. 1904 (1992) and *Seminole Tribe of Florida v. Florida, et al., Civ. No.* 94-12, slip op. at 69 (U.S. March 27, 1996). Any departure from *stare decisis* demands "special justification," *Patterson*, 491 U.S. at 172, which has not been shown here. Where the facts of a case are almost

identical to another, and the law remains the same, no reason, special or otherwise, exists to avoid the application of *stare decisis*.

II. The Tenth Circuit's Decision Is In Harmony with Other Federal and State Courts.

As previously mentioned, this Court has relied on or cited to *Race Horse* twenty times. (*See* discussion, *supra*, text at n.2). Federal courts have cited to or relied on *Race Horse* twenty-eight times.[5] *Race Horse* has been relied on

---

[5] *Crow Tribe v. Repsis*, 73 F.3d 982 (1995); *Tsosie v. United States*, 11 Cl. Ct. 62, 73 (1986), *aff'd*, 825 F.2d 393 (Fed. Cir. 1987); *United States v. State Tax Comm'n of Mississippi*, 541 F.2d 469, 470 (5th Cir. 1976); *United States v. Three Winchester 30-30 Caliber*, 504 F.2d 1288, 1291 n.7 (7th Cir. 1974); *Menominee Tribe of Indians v. United States*, 388 F.2d 998, 1003 (Ct.Cl. 1967), *aff'd*, in reliance on *Race Horse*, 391 U.S. 404, 412 n.12 (1968); *State of Arizona v. Hobby*, 221 F.2d 498, 500 n.11 (D.C. Cir. 1954); *United States v. Tulee*, 110 F.2d 797, 800 (9th Cir. 1940) (distinguished); *Crow Tribe v. Repsis*, 866 F.Supp. 520 (D.Wyo. 1994); *Van Camp Sea Food Co. v. Department of Nat'l Resources*, 30 F.2d 111, 112 (S.D.Cal. 1929); *United States v. 2,271.29 Acres*, 31 F.2d 617, 621 (D.Wis. 1928); *United States v. Karnuth*, 24 F.2d 649, 652 (2d Cir. 1928), *rev'd*, on grounds consistent with *Race Horse*, 279 U.S. 231 (1929); *United States v. Thompson*, 258 F. 257, 267 (E.D.Ark. 1919); *United States v. Samples*, 258 F. 479, 481 (W.D.Mo. 1919), *aff'd*, *Missouri v. Holland*, 252 U.S. 416 (1920); *United States v. McCullagh*, 221 F. 288, 293-94 (D.Kan. 1915); *United States v. Sandoval*, 198 F. 539, 552-3 (D.N.M. 1912), *rev'd*, on grounds consistent with *Race Horse*, 231 U.S. 28, 38 (1913); *McCabe v. Atchinson, T.& S.F. Ry. Co.*, 186 F. 966, 969 (8th Cir. 1911), *aff'd*, in reliance on *Race Horse*, 235 U.S. 151, 159-60 (1914); *Gearlds v. Johnson*, 183 F. 611, 619-625 (D.Minn. 1911); *United States v. United States Express Co.*, 180 F. 1006, 1011 (W.D. Ark. 1910), *rev'd*, 191 F. 673 (8th Cir. 1911); *United States v. Cardish*, 145 F. 242, 245 (E.D.Wis. 1906);

or cited by state supreme courts thirty-nine times[6] and referenced in federal and state agency decisions nine

---

Wadsworth v. Boysen, 148 F. 771, 774 (8th Cir. 1906); *People of South Naknek v. Bristol Bay Borough*, 466 F.Supp. 870, 878 (D.Alaska 1979); *Weeks v. United States*, 406 F.Supp. 1309, 1338 (W.D.Okl. 1975); *United States v. Washington*, 384 F.Supp. 312, 335-36 & 422 (W.D.Wash. 1974) (distinguished), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086, *reh'g denied*, 424 U.S. 978 (1976), *vacated*, 443 U.S. 658 (1979); *Confederated Tribes of the Umatilla Indian Reservation*, 262 F.Supp. 871, 872 (D.Ore. 1966) (explained); *Organized Village of Kake v. Egan*, 174 F.Supp. 500, 503 (D.Alaska 1959); *Toomer v. Witzell*, 73 F.Supp. 371, 377 (E.D.S.C. 1947), *aff'd in relevant part*, 334 U.S. 385 (1948); *Makah Indian Tribe v. McCauly*, 39 F.Supp. 75, 78 (W.D.Wash. 1941) (distinguished), *rev'd*, on ground consistent with *Race Horse*, 128 F.2d 867 (9th Cir. 1942); *United States v. Brooks*, 32 F.Supp. 422, 427-28 (N.D.Ind. 1940).

[6] *Metlakatla Indian Community v. Egan*, 362 P.2d 901, 915-16 (Alaska 1961), *aff'd*, in reliance on *Race Horse*, 369 U.S. 60, 75 (1962); *People v. McCovey*, 685 P.2d 687, 697 (Cal. 1984) (distinguished), *cert. denied*, 469 U.S. 1062 (1984); *Pablo v. People*, 46 P. 636, 637 (Colo. 1896); *State v. McConville*, 139 P.2d 485, 487 (Idaho 1943) (distinguished); *People v. Chosa*, 233 N.W. 205, 206 (Mich. 1930); *State v. Starkweather*, 7 N.W.2d 747, 748 (Minn. 1943); *British-American Oil Prod. Co. v. Board of Equalization*, 54 P.2d 129, 134 (Mont. 1936), *aff'd*, on grounds consistent with *Race Horse*, 299 U.S. 159 (1936); *Ex Parte Crosby*, 149 P. 989, 991 (Nev. 1915); *Kennedy v. Becker*, 109 N.E. 116, 117 (N.Y. 1915), *aff'd*, in reliance on *Race Horse*, 241 U.S. 556, 562 (1916); *State v. Truax*, 157 N.E. 792, 793 (Ohio 1927); *Ex Parte Nowabbi*, 61 P.2d 1139, 1155 (Okl. 1936); *Underhill v. State*, 237 P. 628, 630 (Okl. 1925); *Starks v. Joines*, 223 P. 882, 886 (Okl. 1924); *Huff v. State*, 133 P. 265, 267 (Okl. 1913); *Williams v. Johnson*, 122 P. 485, 488 (Okl. 1912), *aff'd*, 239 U.S. 414 (1915); *Smith v. Hepburn*, 113 P. 932, 934 (Okl. 1911) (distinguished); *Coyle v. Smith*, 113 P. 944, 955 (Okl. 1911) (dissent) (explained), *aff'd*, in reliance on *Race Horse*, 221 U.S. 559, 573 & 576 (1911); *Godfrey v. Iowa Land & Trust Co.*, 95 P. 792, 800 (Okl. 1908); *Higgins v. Brown*, 94 P. 703, 727 (Okl. 1908);

times.[7] In total, *Race Horse* has been cited or relied on, explained or distinguished, almost a hundred times.

Frantz v. Autry, 91 P. 193, 203 (Okl. 1907); *MacCormick v. Molinari*, 16 P.P.R. 389, 403 (Puerto Rico 1910); *Hollow Horn Bear v. Jameson*, 95 N.W.2d 181, 182 (S.D. 1959); *Washington State Commercial Passenger Fishing Vessel Ass'n v. Tollefson*, 571 P.2d 1373, 1378 n.4 (Wash. 1977), *vacated*, on ground consistent with *Race Horse*, 443 U.S. 658, 682 n.25 (1979); *Anderson v. O'Brien*, 524 P.2d 390, 402 (Wash. 1974) (dissenting opinion); *Department of Game v. Kautz*, 422 P.2d 771, 773 (Wash. 1967), *aff'd*, on grounds consistent with *Race Horse*, *Puyallup I*, 391 U.S. 392 (1968); *State v. McCoy*, 387 P.2d 942, 944 (Wash. 1963); *State v. Satiacum*, 314 P.2d 400, 404-05 (Wash. 1957) (distinguished); *State v. Tulee*, 109 P.2d 280, 283 (Wash. 1941), *rev'd*, 315 U.S. 681 (1942); *State v. Wallahee*, 255 P. 94, 95 (Wash. 1927); *State v. Meninock*, 197 P. 641, 642 (Wash. 1921); *State v. Superior Court*, 181 P. 688, 689 (Wash. 1919); *State v. Towessnute*, 154 P. 805, 809 (Wash. 1916); *Sturdevant v. State*, 251 N.W.2d 50, 53 (Wis. 1977), *cert. denied*, 431 U.S. 970 (1977); *State v. Gurnoe*, 192 N.W.2d 892, 900 n.29 & 901 (Wis. 1972) (distinguished); *State v. Sanapaw*, 124 N.W.2d 41, 44 (Wis. 1963), *cert. denied*, 377 U.S. 991, *reh'g denied*, 379 U.S. 871 (1964); *State v. LaBarge*, 291 N.W. 299, 300 (Wis. 1940); *State v. Morrin*, 117 N.W. 1006, 1006-07 (Wis. 1908); *In re the General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76, 97 & dissent at 133 (Wyo. 1988), *cert. denied*, 492 U.S. 926 (1989); *Merrill v. Bishop*, 287 P.2d 620, 623 (Wyo. 1955).

[7] *Northern States Power Co.*, 50 FPC 753, 762 n.3 (1973); 29 U.S. Op. Att'y Gen. 455, 461-62 (June 19, 1912); 71 Sol. Op. 469, 471 (I.D. No. 12, Dec. 1, 1964); 54 Sol. Op. 418, 420 (I.D. April 5, 1934); 53 Sol. Op. 349, 361 (I.D. April 15, 1931); 3 Wyo. Att'y Gen. Op. 11, 14 (Feb. 26, 1973); Wyo. Att'y Gen. Op. 27, 28 (July 25, 1901); Wyo. Att'y Gen. Op. at 51 (Nov. 30, 1901); Wyo. Att'y Gen. Op. 97, 98 (July 29, 1899).

Only a few courts have actually expressly criticized the holding of *Race Horse*.[8] These include the cases on which the Crow Tribe primarily relies, as set forth below.

In *State v. Arthur*, the Nez Perce treaty contained language providing a "right of taking fish at all usual and accustomed places in common with citizens of the Territory," and further "the privilege of hunting . . . upon open and unclaimed lands." 261 P.2d 135, 136 (Idaho 1953), *cert. denied*, 347 U.S. 937 (1954). The Idaho Supreme Court first distinguished *Race Horse* by stating that the rights of the Nez Perce were intended to be continuing and could not be extinguished except by the appropriate means, which did not include the admission of Idaho into the Union. The Idaho Court nevertheless then criticizes *Race Horse* by boldly stating that later opinions of the U.S. Supreme Court indicate that the decision has not been followed for this proposition. *Id.* at 139 (citing *Winans*, *Tulee*, *Dick*, and others which interpret language unlike the language at issue here). However, as previously explained, this Court did not follow *Race Horse* in later off-reservation hunting decisions because the rights extended were continuing and not temporary. Thus, *Race Horse* was not applicable to those cases.

---

[8] *Settler v. Lameer*, 507 F.2d 231, 238-239 (9th Cir. 1974); *Holcomb v. Confederated Tribes of Umatilla Indian Reservation*, 382 F.2d 1013, 1014 n.3 (9th Cir. 1967) (distinguished and then questioned); *United States v. Michigan*, 471 F.Supp. 192, 268 (W.D. Mich. 1979), *aff'd in part*, 653 F.2d 277 (6th Cir.), *cert. denied*, 454 U.S. 1124 (1981); *State v. Arthur*, 261 P.2d 135, 138-39 (Idaho 1953) (distinguished and then questioned); *State v. Tinno*, 497 P.2d 1386, 1392 n.6 & concurrence at 1395 (Idaho 1972); *State v. Jondreau*, 185 N.W.2d 375, 378 (Mich. 1971).

The other cases on which the Crow Tribe relies, involving the same treaty language as in issue here, are also distinguishable for one reason or another. For example, in *State v. Tinno*, the State of Idaho had stipulated that the national forest in question was "unoccupied." 497 P.2d 1386, 1391 (Idaho 1972). No such stipulation was made here or in *Race Horse*. Based in part on this stipulation, the Idaho Supreme Court interpreted the Bannock treaty differently than this Court had in *Race Horse*. It concluded that the right to hunt on "unoccupied lands of the United States," includes a right to fish on national forest lands. *Id.*

Moreover, unlike the *Race Horse* Court, the Idaho court failed to consider the word "unoccupied" in context with the words "hunting districts." Instead, the *Tinno* court concluded that *Race Horse* had been "entirely discredited" without it entering into the kind of thorough discussion required under the rules of *stare decisis* or when "entirely discrediting" a U.S. Supreme Court decision. *See* 497 P.2d at 1392 n.6. *See also Crow Tribe*, 73 F.3d at 994 n.6. Rather than rely on *Race Horse*, the *Tinno* court relies extensively on *State v. Arthur*, which interpreted treaty language entirely different than the language in *Tinno*, *Race Horse* or the present case. 497 P.2d at 1392.

Finally, despite its discussion as to the hunting rights of the tribe, the Idaho Supreme Court in *Tinno* ultimately dismissed the appeal based on lack of jurisdiction. *Id.* at 1388. Thus, the entire weight of the decision is questionable, as indicated by the Tenth Circuit. 73 F.3d at 994 n.6.

In *State v. Cutler*, the treaty language in issue was the same language in issue in *Race Horse*. Nevertheless, the Idaho Supreme Court did not discuss *Race Horse*, but relied extensively on its prior *Tinno* decision. 708 P.2d 853, 856-57 (Idaho 1985). While the *Cutler* court determined that a state-owned wildlife reserve was not "unoccupied," it nevertheless concluded that the treaty rights continued. *Id.* at 859. Again, the kind of analysis required for discrediting a U.S. Supreme Court decision is not contained in this case. Moreover, this case is distinguishable because the land in issue was not a federal national forest, but state-owned land.

The other cases on which the Crow Tribe relies do not involve the same or similar treaty language as the treaty in issue in this case.[9] Because these cases do not involve

---

[9] *See People v. LeBlanc*, 248 N.W.2d 199 (Mich. 1976) (to hunt *"until the land is required for settlement."*); *State v. Miller*, 689 P.2d 81 (Wash. 1984) (to hunt on *"open and unclaimed lands."*); *State v. Stasso*, 563 P.2d 562 (Mont. 1977) (hunting on *"open and unclaimed lands."* In addition, Montana's Act of Admission contained an exemption in favor of and for the benefit of the Indians); *United States v. Michigan*, 471 F.Supp. 192 (W.D.Mich 1979), *aff'd in part*, 653 F.2d 277 (6th Cir.), *cert. denied*, 454 U.S. 1124 (1981) (aboriginal and treaty right to fish *"on the lands ceded with the other usual privileges of occupancy, until the lands is required for settlement"*); *Lac Courte Orelles Band v. Voight*, 700 F.2d 341 (7th Cir.), *cert. denied*, 464 U.S. 804 (1983) (the treaty language in issue recognized the right to hunt *"until required to be removed by the President of the United States."*); *Holcomb v. Confederated Tribes of Umatilla Reservation*, 382 F.2d 1013 (9th Cir. 1967) (treaty "privilege of hunting on *unclaimed lands in common with citizens.*" This treaty, unlike the one in issue in this case, was ratified *after* state's admission); *Settler v. Lameer*, 507 F.2d 231 (9th Cir. 1974) (treaty reserved to the Indians "right of

interpretation of the same treaty language in question in this case and *Race Horse*, they are not applicable to the issue at hand.

III. The Tenth Circuit's Alternate Holding that the Big Horn National Forest Lands Are Occupied Was Proper.

When the 1868 Crow treaty was executed, the federal lands located in the Big Horn mountains were "unoccupied." *Crow Tribe*, 73 F.3d at 993. In 1897, the Big Horn National Forest (BHNF) was created by Presidential Proclamation, and then ratified by an Act of Congress. (Presidential Proclamation, No. 30, 29 Stat. 909 (1897); Act of June 4, 1897, ch. 2, 30 Stat. 34 (1897)).

In creating the BHNF, Congress expressly mandated that the national forest be managed and regulated for the specific purpose of improving and protecting the forest, securing favorable water flows, and furnishing a continuous supply of timber. 73 F.3d at 993, *citing*, 16 U.S.C. § 475. These lands were no longer available for settlement, nor could anyone timber, mine, log, graze cattle, or homestead without federal permission.[10] *Id.*, *citing*, Act of June 4, 1897, ch. 2, 30 Stat. at 35-36 (1897).

---

taking fish at all *usual and accustomed places, in common with citizens of the Territory*") (emphasis added).

In both Ninth Circuit cases criticizing *Race Horse*, the courts' criticism is contained primarily in footnotes, without any in-depth discussion on why *Race Horse* should be discredited and ignored. *See Holcomb*, 382 F.2d at 1014 n.3; *Settler*, 507 F.2d at 239 & n.10.

[10] In 1960, Congress passed the Multiple-Use Sustained Yield Act of 1960 which provided that "national forests are

As a result of the creation of the BHNF, Congress carved out the "unoccupied" public lands for a specific public use much like it carved out Yellowstone National Park, so that the land became "occupied." *See Race Horse*, 163 U.S. at 510. As this Court has stated, Congress' power to regulate and dispose of public property, by creating a national forest reservation, such as the BHNF, is without limitation. *See Kleppe v. New Mexico*, 426 U.S. 529, 539, *reh'g denied*, 429 U.S. 873 (1976); *Ivanhoe Irrig. Dist. v. McCracken*, 357 U.S. 275, 294-95 (1958).[11]

The Crow Tribe relies on five cases in support of its claim that the BHNF remains "unoccupied." However, these cases do not involve the issue of whether forest lands are *"occupied,"* but whether they are in the "public

---

established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes," as well as the original purposes set forth in 16 U.S.C. § 475. 73 F.3d at 993 n.4, *citing*, 16 U.S.C. § 528.

[11] The Crow Tribe contends that the BHNF is "unoccupied" because the Forest Service and Wyoming allow and encourage hunting on those lands. (Petitioners' S.Ct. Brief, at 24). However, as required for timbering, mining, logging, and grazing on national forest lands located in Wyoming, hunting is only permitted on those lands in conjunction with federal and state permission. Federal permission for hunting is regulated by the State as delegated through a 1977 Memorandum of Understanding with the Forest Service, and through various conservation acts and regulations. *See* Multiple-Use, Sustained-Yield Act of 1960 (MUSY), 16 U.S.C. §§ 528-31, at § 528; National Forest Management Act of 1976 (NFMA), 16 U.S.C. §§ 1600-14, at § 1604(a) & (g)(3)(A); Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §§ 1701-84, at § 1732(b); 36 C.F.R. § 241.2.

domain" or *"open and unclaimed."*[12] For those reasons alone, these cases are distinguishable.

IV. The Tenth Circuit Properly Determined that the State's Regulations were Reasonable and Necessary for Conservation.

The Tenth Circuit found that even if the Treaty with the Crow Tribe had reserved a continuing right which has survived Wyoming's admission into the Union, there was ample evidence in the record to support the State's contention that its regulations were reasonable and necessary for conservation. *See* 73 F.3d at 993.

---

[12] *Swim v. Bergland*, 696 F.2d 712, 714, 716-17 (9th Cir. 1983) (right to pasture livestock on the ceded "public land" so long as it "remain part of the *public domain*"); *Holcomb v. Confederated Tribes of Umatilla Reservation*, 382 F.2d 1013, 1014-15 (9th Cir. 1967) (court offers no reasoning why it considered forest lands included within *"unclaimed lands* in common with citizens"); *State v. Miller*, 689 P.2d 81, 82 n.2 (Wash. 1984) (court never reached issue of whether *"open and unclaimed"* lands included forest land reservations as State did not "dispute or question this interpretation on appeal"; *State v. Stasso*, 563 P.2d 562, 564-65 (Mont. 1977) (court relied exclusively on *State v. Tinno* and *State v. Arthur* to conclude that forest lands remain *"open and unclaimed"*); *State v. Arthur*, 261 P.2d 135, 141 (Idaho 1953) (forest lands are *"open and unclaimed"* since they were not settled and occupied by whites under possessory rights or patent or otherwise appropriated to private ownership).

But see United States v. Hicks, 587 F.Supp. 1162, 1166-67 (W.D.Wash. 1984) (national park lands were withdrawn for a specific national use so that they are no longer "open and unclaimed").

In both its Complaint and Amended Complaint, the *Crow Tribe* asserts an "unrestricted" treaty right to hunt on BHNF. *See also* 73 F.3d at 998. As the Tenth Circuit determined, there is ample evidence in the record to show that unrestricted hunting would jeopardize the wildlife populations in BHNF. The State determines the number of big game animals that may be taken during each hunting season in order to conserve the state's wildlife resources. The Crow Tribe has provided this Court with misleading statements on elk and other big game populations in the BHNF. While elk populations statewide may have increased, the big game populations on the BHNF are limited. Consequently, the Wyoming Game and Fish Department does not allow hunting of big horn sheep, and limits the hunting of moose and elk in the BHNF in order to maintain viable populations (J.A., at 270-273). Thus, the Court properly found that state regulation is necessary and in this case is reasonable.

CONCLUSION

As the Tenth Circuit so succinctly states, "*Race Horse* is alive and well," and "[t]here is nothing to indicate that it has been 'overruled, repudiated or disclaimed.' " 73 F.3d at 994. *Race Horse* is not a "blot" on this Court's record, as the Crow Tribe contends. Rather, *Race Horse* is a well-reasoned decision founded on bed-rock principles enunciated repeatedly by this Court and others for over one hundred years. Such overwhelming reliance surely passes any "ink blot" test.

Based on the foregoing reasons, Respondents, Mr. Repsis and Mr. Petera, ask the Court to deny Petitioners Mr. Ten Bear's and Crow Tribe's request for writ of certiorari.

Respectfully submitted,

WILLIAM U. HILL
Wyoming Attorney General

RON ARNOLD*
Senior Assistant Attorney General

KRISTI T. SANSONETTI
Assistant Attorney General
123 Capitol Building
Cheyenne, Wyoming 82002
Telephone: (307) 777-7844

Counsel for Respondents
Chuck Repsis and Francis Petera

*Counsel of Record

(3)

No. 95-1560

Supreme Court, U.S.
FILED
MAY 15 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

CROW TRIBE OF INDIANS and
THOMAS L. TEN BEAR,

Petitioners,

v.

CHUCK REPSIS, individually; and
FRANCIS PETERA, individually,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

REPLY BRIEF OF PETITIONERS

DALE T. WHITE*
ROBERT S. PELCYGER
FREDERICKS, PELCYGER, HESTER
& WHITE LLC
1881 9th Street, Suite 216
Boulder, Colorado 80302
Telephone: (303) 443-1683

Counsel for Petitioner
Crow Tribe of Indians

BRUCE P. BADLEY
BADLEY & RASMUSSEN, P.C.
P.O. Box 648
Sheridan, Wyoming 82801
Telephone: (307) 672-5878

Counsel for Thomas L. Ten Bear

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

6 pp

REPLY BRIEF OF PETITIONERS

Pursuant to Sup. Ct. Rule 15.6, Petitioners, Crow Tribe of Indians and Thomas L. Ten Bear, file this Reply Brief to the Brief in Opposition to Petition For a Writ of Certiorari filed by Respondents. The arguments presented below will be confined to new points raised in the Brief in Opposition.

I. ARGUMENT

A. THE PETITIONERS NO LONGER CONTEND THAT THEIR OFF-RESERVATION HUNTING RIGHTS ARE UNRESTRICTED.

Respondents contend that the Petitioners have "misstated" the nature of the hunting right being asserted. Brief in Opposition, p. 5. The Complaint and Amended Complaint referred to an "unrestricted" hunting right. In subsequent briefs submitted to lower courts, however, the Petitioners acknowledged that the off-reservation Treaty hunting right in Article 4 of the 1868 Crow Treaty may be regulated by the State of Wyoming under the conservation standard enunciated by this Court.[1] See, *Puyallup Tribe v. Department of Game*, 391 U.S. 392 (1968); *Department of Game v. Puyallup Tribe*, 414 U.S. 44 (1973); *Puyallup Tribe v. Department of Game*, 433 U.S. 165, 175-76 (1977); and *Washington v. Washington Fishing Vessel Ass'n*, 433 U.S. 658 (1977). Pursuant to Fed. R. Civ. P. 15(b), this acknowledgement resulted in an amendment to conform to the evidence.

B. THE *WARD v. RACE HORSE* DECISION CANNOT BE SUSTAINED BY REFERENCE TO ITS INTERPRETATION OF THE TREATY TERMS "HUNTING DISTRICTS".

Respondents' reliance on this Court's reference to the "hunting districts" language in Article 4 of the Fort Bridger

---

[1] Joint Appendix, 10th Cir. at 531, 544-46; 10th Cir. Brief of Appellants, pp. 31-34; 10th Cir. Reply Brief at pp. 1-2.

Treaty in *Ward v. Race Horse*, 163 U.S. 504 (1896), requires clarification. See Brief in Opposition, pp. 3-4. In the context of Article 4, the plain meaning of the term "hunting districts" is obvious. It refers to the areas outside of the boundaries of the 1868 Reservation on which tribal members hunted at the time of the Treaty. As this Court noted in *Ward v. Race Horse*, 163 U.S. at 508, in the absence of that term, the hunting right reserved in Article 4 could be construed as applying to all unoccupied lands of the United States, wherever located. Neither the term "hunting districts" nor the clause in which it is found, "so long as peace subsists on the borders of the hunting districts," can plausibly be read as manifesting a mutual intent to terminate the off-reservation hunting right when a future state encompassing the hunting districts was admitted to the Union.[2]

C. NO DECISIONS OF THIS COURT MAKE THE DISTINCTION BETWEEN "TEMPORARY AND PRECARIOUS" TREATY RIGHTS AND "CONTINUOUS" TREATY RIGHTS.

Contrary to the Respondents' numerous misstatements, the difference between "temporary and precarious" treaty rights and "continuous" treaty rights employed by the Tenth Circuit was never previously applied by this or any other court. As Petitioners pointed out, the Seventh Circuit in *Lac Courte Oreilles Band v. Voigt*, 700 F.2d 341 (7th Cir.), *cert. denied*, 464 U.S. 805 (1983), expressly rejected this argument. No decision of this Court relies on that difference to distinguish *Race Horse* from other provisions reserving off-reservation hunting rights.

The Crow Tribe's Article 4 treaty right is "conditional," but the right exists until one of the specified conditions is

---

[2] Respondents continue to rely upon "silence" in the Wyoming Admission Act, Brief in Opposition at p. 3, when in fact that Act ratified the Wyoming Constitution which contains an express disclaimer of jurisdiction over Indian lands. This Court erred in *Race Horse* by failing to take account of this disclaimer and its ratification by Congress.

satisfied: (1) so long as game may be found; (2) so long as peace subsists among the whites and Indians on the borders of hunting districts; and (3) so long as the lands are "unoccupied." Today, it is undisputed that there is game within the Big Horn National Forest, that there is peace, that hunting is permitted on the national forest lands, that they are not occupied, and that the forest lands are within the Crow Tribe's aboriginal hunting areas. None of these three conditions has anything to do with either the admission of a future state to the Union or the equal footing doctrine.

D. THE U.S. SUPREME COURT HAS NOT CITED *RACE HORSE* FOR ITS HOLDING THAT THE ADMISSION OF A STATE REPEALS INDIAN HUNTING RIGHTS.

Respondents assert that *Race Horse* has been "relied on or cited" by this Court twenty times, showing its continued vitality. Brief in Opposition, pp. 16-22. This Court has cited *Race Horse* over the years, however, it has not "relied" on the holding in that decision in any sense. Since 1962, *Race Horse* has been cited six times.[3] Three citations are for the general proposition that off-reservation activities are generally subject to state regulation.[4] The *Fishing Vessel Ass'n* decision cites *Race Horse* for the rule that treaty fishing rights are immune from state regulation "save that required for conservation." 443 U.S. at 682 n.25. The most recent reference, *Oregon Wildlife Department v. Klamath Tribe*, 473 U.S. 753,

---

[3] *Oregon Wildlife Dept. v. Klamath Tribe*, 473 U.S. 753, 773 n.23 (1982); *State of Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 179 (1980) (Rehnquist concurrence and dissent), *reh'g denied*, 448 U.S. 911 (1980); *Washington v. Fishing Vessel Ass'n*, 443 U.S. 658, 682 n.25 (1979); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 149 (1973); *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412 n.12 (1968); and *Organized Village of Kake v. Egan*, 369 U.S. 60, 75 (1962).

[4] *Organized Village of Kake*, *Mescalero Apache Tribe* and *Confederated Tribes of Colville*, *supra*.

773 n.23 (1985), cites *Race Horse* as a "Cf.," as an instance where Congress was found to have ended "special rights" of a tribe outside its reservation. In *Klamath*, there was *no* treaty right to hunt or fish *off-reservation*. *See* 473 U.S. at 769 n.20 (distinguishing *Winans* because "the cession agreement in *Winans* expressly preserved the right to fish on nonreservation lands"). Where such rights are preserved by treaty (as in *Winans* and in this case), they do not provide "absolute freedom from state regulation on nonreservation lands," but nevertheless confer "special . . . rights that are independent of any ownership of land." *Id.* at 765-66 and nn.16 and 17. Thus, *Klamath* reaffirms this Court's settled doctrine that express off-reservation rights confer immunity from those state laws that are not necessary for conservation, and provides no support for the state's assertion that *Race Horse* stands for a contrary reading of the Fort Bridger Treaty.[5]

E. THERE IS NO MEANINGFUL DIFFERENCE BETWEEN "OPEN AND UNCLAIMED" LANDS AND "UNOCCUPIED LANDS".

Respondents attempt to distinguish between the cases interpreting treaty language reserving the right to hunt on "public domain," "open and unclaimed" and "unclaimed" lands. Brief in Opposition, pp. 24-25. If anything, the Crow Tribe's Article 4 provision reserving the right to hunt on "unoccupied lands" of the United States presents a stronger case. In *Holcomb, Miller, Stasso* and *Arthur,* the courts held that national forest acts did not make the forest lands "claimed" meaning that they were subject to homestead patents or other assertions of ownership claims by

---

[5] With the possible exception of *State v. McCoy,* 387 P.2d 942, 944 (Wash. 1963), none of the state and lower federal court decisions follows the *Race Horse* holding that the admission of a state terminates off-reservation treaty hunting and fishing rights. Certainly none of these decisions supports the Tenth Circuit's distinction between "temporary" and "continuing" treaty rights. The fact remains that the Tenth Circuit deviated from decisions of state supreme courts and federal courts of appeal.

non-Indian settlers.[6] If national forest lands are not "claimed," they certainly are not "occupied." "Occupancy" is clearly a step beyond a mere claim of ownership. There are therefore clear conflicts both between the circuits and between the Tenth Circuit and the state supreme courts regarding the issue of whether Indian off-reservation treaty rights apply to lands within national forests.

CONCLUSION

Respondents state in their Brief in Opposition that this case is "deja vu all over again."[7] It is not. The facts in these two cases, separated by 100 years may be similar, but the legal landscape has changed dramatically. For these reasons the petition should be granted.

Respectfully submitted,

DALE T. WHITE*
ROBERT S. PELCYGER
FREDERICKS, PELCYGER, HESTER & WHITE
1881 9th Street, Suite 216
Boulder, Colorado 80302
Telephone: (303) 443-1683

Counsel for Petitioner Crow Tribe of Indians

BRUCE P. BADLEY
BADLEY & RASMUSSEN, P.C.
P.O. Box 648
Sheridan, Wyoming 82801
Telephone: (307) 672-5878

Counsel for Thomas L. Ten Bear

*Counsel of Record

---

[6] *Holcomb v. Confederated Tribes of Umatilla Reservation*, 382 F.2d 1013 (9th Cir. 1967); *State v. Miller*, 689 P.2d 81 (Wash. 1984); *State v. Stasso*, 563 P.2d 562 (Mont. 1977); and *State v. Arthur*, 261 P.2d 135 (Idaho 1953), *cert. denied*, 347 U.S. 937 (1954).

[7] Brief in Opposition, p. 1.